No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA, et al.,
Appellees.

ON APPEAL
FROM THE SUPREME COURT OF CALIFORNIA
BRIEF OF CENTER FOR PUBLIC INTEREST LAW
OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
IN AMICUS CURIAE IN SUPPORT OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

Robert C. Fellmeth
Center for Public Interest Law
University of San Diego
School of Law
Alcala Park
San Diego, California 92110
(619) 260-4806

Attorneys for Amicus Curiae

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.

INTRODUCTION

On April 6, 1983, the PUC decided *Center for Public Interest Law, et al. v. San Diego Gas and Electric Company* (No. 83-04-020, 1983). This decision first established an apparently close precedent now being challenged in the instant case before this Honorable Court. The *Center* case involved a comprehensive proposal to establish a ratepayer representative organization.

The Center respectfully applies to have its arguments considered by this Honorable Court as to the impact of the issues raised by the instant litigants on other preexisting organizations. Such argument is, in the most traditional sense, an *amicus curiae* contribution.

II.

IDENTIFICATION OF *AMICUS CURIAE* APPLICANT

The Center for Public Interest Law at the University of San Diego School of Law is a non-profit academic center of learning focusing on the regulatory process within the State of California. The Center publishes the *California Regulatory Law Reporter*, the major academic journal monitoring and reviewing regulatory agency activity in the State.

The Center for Public Interest Law was also the complainant in *Center for Public Interest Law, et al. v. SDG&E*, No. 83-04-020, 1983), as noted above, the lead holding of the PUC allowing access to the billing envelopes of a regulated utility to another entity prior to the instant case. In addition to being a party, the Center litigated the case as counsel in administrative hearings before Administrative Law Judge Alison Colgan and was subsequently ordered by the Public Utilities Commission to create a ratepayer group called Utility Consumers Action Network (UCAN) pursuant to the Center's proposal. An Interim Board was appointed

to establish the entity to be given access and to supervise fair elections.

III.

THE INTERESTS OF THE *AMICUS CURIAE* APPLICANT IN THE INSTANT PROCEEDINGS, PERMISSION OF LITIGANTS.

The Center for Public Interest Law was the original proponent of UCAN and of its right to access to the billing envelopes of SDG&E for purposes of communication and membership solicitation. As its proponent, the Center has an interest in seeing to it that it is not terminated, particularly after proving itself a success in improving the state regulatory system and in enhancing First Amendment values.

All parties to the instant proceeding have given permission for the filing of this *Amicus* brief.

IV.

RATEPAYERS ARE A LEGITIMATE PART OF THE REGULATORY PROCESS, AND MAY BE AFFORDED A ROLE IN USING THE RESOURCES INVOLUNTARILY PROVIDED BY THEM.

This Court has long recognized a three-part relationship relevant to utility regulation. The regulator, the utility, and the ratepayer constitute the major interested parties in utility regulation. See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Lacking marketplace choice, the interests of the ratepayer must be represented through regulatory check over what would otherwise be unfettered monopoly power. It is the well recognized function of the regulator to provide this check, while at the same time

affording a "reasonable rate of return" to utility stockholders. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

The regulator's role in balancing "fair rate of return" for utility stockholders against preventing excessive profits is not the same interest held by either the utility or ratepayer. This decisionmaking by the regulator does not occur in a vacuum. The regulator requires information in order to perform this fundamental regulatory balance.

The record in the *Center* case established serious problems in the regulation of a utility (San Diego Gas and Electric) to the detriment of one of the three parties of interest: the ratepayers. Undisputed evidence established low voltage problems in areas of the County, non-responsiveness by SDG&E to consumer complaints across a panoply of issues, the second highest electrical power rates in the nation, failure to comply with PUC payment plan requirements, overzealous collection attempts and an imbalance of information flow and advocacy to the PUC in rate hearings. The proceedings established that the billings of SDG&E are an expense item paid for off the top by ratepayers, and that SDG&E included information and cause advocacy unrelated to regulation in prior ratepayer financed mailings. The proceedings also established that "dead space" in the billing envelopes existed sufficient to carry inserts from an organization representing ratepayers *at no additional cost to the utility*. This was space the utility (*i.e.* ratepayer) was paying for but which was unused. Expert mail order witnesses testified to the likely effects of the insert to facilitate a voluntary organization. (See RT 1-400, *Center v. SDG&E*, No. 82-03-05).

The purpose of the UCAN proposal was to create an organization fairly representative of the third party in the regulatory proceedings described above; the ratepayers. And to specify PUC rules assuring that representative status. (See complaint, *Center v. SDG&E*, No. 82-03-05.)

As a legitimate party in a three part relationship, ratepayers are compelled to finance utility expenses and to provide a reasonable rate of return on a prudently invested rate base. The UCAN remedy established important safeguards recognizing that the billing envelope, although the property of the utility, involved an equity interest in the party involuntarily financing it. To guarantee that the access grant was to ratepayers, the proposal called for safeguards and standards; a fair and supervised election (with opportunity for nomination by petition) representative of the ratepayer population affected, conflict of interest prohibitions and open meetings guarantees. (See proposed By-Laws, Complaint in *Center v. SDG&E*, No. 82-03-05.)

The Center for Public Interest Law viewed the order of the PUC as a special fiduciary responsibility. An Interim Board was selected including the Mayor of the City, a Republican State Senator, a Democratic Supervisor, prosecutors from the three jurisdictions within the County, a labor leader, a legal aid attorney, the foreman of the grand jury and the Dean of another law school in the County. The election of the Board itself was a demonstration of our democratic system; the Registrar of Voters administered an election of nine permanent Board members from among twenty-seven candidates, eighteen of them petition nominees. The voting percentage from 60,000 UCAN members, who had by then joined, more than doubled the voting percentage of registered voters during the previous municipal elections.

Since the election of the permanent Board, UCAN has hired legal and technical experts to represent SDG&E ratepayers in PUC proceedings.

In August 1984, UCAN intervened in SDG&E's Energy Cost Adjustment Clause (ECAC) proceeding, presenting evidence that SDG&E's requested $56 million rate increase should be reduced by $40 million. The Commission's order reduced SDG&E's request by $36 million.

UCAN is currently intervening in SDG&E's general rate case. UCAN is questioning SDG&E's request for an increased return on investment and whether it is using its new transmission line to purchase sufficient inexpensive power from Southwest utilities. UCAN will also present expert testimony on rate design issues.

UCAN's third SDG&E rate case will be the review of the cost overruns on the San Onofre Nuclear Generating Stations (SONGS) Units Two and Three during hearings set for this summer. UCAN has retained technical experts to seek to disallow from rates those construction costs found to be the result of bad management.

The PUC is preparing to hold hearings on the adoption of a long-range natural gas rate design policy. UCAN has participated in preliminary, informal discussions with Commission staff and is participating in the formal proceeding.

UCAN participated in the Commission's informational hearings on electric utility policy on March 25-26.

UCAN is participating in the PUC's proceeding to decide the procedure to be used to determine the attrition allowance for the third year of a general rate case, now that general rate cases have been extended to three years.

UCAN has participated in California Energy Commission hearings on SDG&E's long-term energy supply plans and hearings on the Commission's proposed regulation to strengthen its energy efficiency standards for refrigerators sold in California. UCAN has also commented on the Energy Commission's draft State Energy Plan.

UCAN devotes substantial resources to a public education program, a major element of which is a quarterly newsletter. UCAN has hosted public speaking appearances by nationally prominent utility experts. UCAN representatives appear on local talk shows

and speak to community organizations. UCAN has responded to hundreds of questions and complaints, providing information and referrals.

UCAN represents effectively the views of otherwise unorganized and silent generalized and diffuse interests. There was no such activity prior to UCAN. *Only* the access provided by the PUC has allowed UCAN to exist and to continue.

V.

PROPER RATEPAYER ACCESS TO BILLING ENVELOPES CAN ENHANCE FIRST AMENDMENT VALUES.

UCAN has voluntarily agreed to an arbitration proceeding with SDG&E where there are disputes concerning the content of inserts. The permanent Board is now in office and is functioning with the confidence of UCAN members and other ratepayers represented by that organization. Its meetings are public and often.

The inserts provided by UCAN add to the diversity of free expression received by ratepayers. This diversity enhances First Amendment values. It is, in essence, a communication from the proper representatives of ratepayers to their fellow ratepayers who finance the billing system. The Pacific Gas and Electric arguments concerning First Amendment infringement and "taking" of property are particularly flawed where the party being given access constitutes the institutionally established will of a legitimate party in the three part relationship, *i.e.* the ratepayers.

The PUC can require an insert *itself* for a regulatory purpose. And we believe that the PUC can delegate that access to a party legitimately representing ratepayers — a legitimacy deriving from institutionally established rules from the PUC to guarantee that representation, or from direct PUC review of the performance of that party on behalf of ratepayers. Whichever mechanism is

chosen: institutional safeguards for ratepayer electoral representation, or PUC review of ratepayer interest assistance, is a matter for policy argument, not Constitutional inquiry. The Center has strenuously argued in favor of the former model, and has successfully implemented it. However, the latter alternative does not impede the First Amendment rights of a utility. They are free to express the views of their stockholders and to compel ratepayer payment for the message. To allow a minimal word from those legitimately speaking for ratepayer interests through this medium enhances discussion and airs alternative points of view, consistent with First Amendment values. And contrary to PG&E argument herein, such messages can be and are properly and ostentatiously marked as to their source. There is no compulsion for a utility to speak an involuntary message. The utility does not pay for the printing or stuffing — or, for that matter, the postage. And in seven UCAN inserts, there has been no measurable confusion about which message is from whom. The PG&E argument about a right "not to speak" is silly. They are not being forced to speak and no one thinks they have spoken.

Without drawing mechanical analogies between shopping center property use cases, symbolic free speech holdings, commercial free speech evolution, etc., what the Court should be focusing on is: 1. Who pays for the messge? 2. Who is, in a practical sense, most deprived of expression opportunity without access? 3. Does access for legitimate ratepayer expression as to one sheet of paper out of five or six in an envelope once every three months (*e.g.* in the case of UCAN), enhance or threaten First Amendment values? Utility sponsored inserts already proliferate to plug favored insulation contractors, promote nuclear energy, solicit for certain charities, publish pictures of missing children, present utility "explanations" for rate hikes, et al.

Certainly the fundamental concern of this Court has been both the right to speak, and practical access to means so one can be heard. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Can one properly argue that the First Amendment requires that

only one voice effectively be heard? The Center does not believe a monopoly utility is exactly like a shopping center, nor is it, when seeking exclusive use of ratepayer financed billing envelopes, exactly like a pharmacy only seeking to advertise prices. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). The question this *Amicus* asks is, in the case of UCAN, can 75,000 voices express themselves in an occasional message to each other and their fellow ratepayers through a medium ratepayers finance not through competitive choice, but by legal imposition.

Can they do so in a society with very high costs of communication access on behalf of an inherently unorganized group? Can the state stimulate such communication at no cost to any other party? Would a federal prohibition on such state enhancement of diversified expression and voluntary organization constitute a betrayal of constitutional principle?

VI.

STATES SHOULD BE GIVEN THE OPPORTUNITY TO FASHION REGULATORY RULES GOVERNING MONOPOLIES WHICH MAY BALANCE IN SOMEWHAT DIVERSE WAYS THE INTERESTS OF: (A) THE MONOPOLIST IN UNFERRERED USE OF ITS PROPERTY AND (B) THE STATE IN A BALANCED AND FAIR SYSTEM OF ADVOCACY BEFORE ITS REGULATORS

In the case of UCAN, we have a state agency which has, after proper evidentiary hearing, established: a) There is no PUC office within 100 miles of the area affected; b) There is an imbalance in advocacy depriving diffuse but momentous interests of representation; c) A means is available to allow communication between ratepayers where it is currently lacking; d) A means is available to facilitate enhanced communication between ratepayer interests

and the regulator; e) Those means will cost the ratepayer and the utility nothing (taken from unusual dead space with printing and organizational expenses entirely funded by voluntary contribution). Similar findings are applicable to TURN.

On what basis can a utility argue that an exalted principle is appropriately invoked to bar such a mechanism? On the basis of societal rules designed to protect fundamental freedoms? On the basis of an interest in diversity of viewpoint? On the grounds of monopoly property rights?

The Center for Public Interest Law respectfully contends that it is important for government to find ways to represent otherwise unorganized groups. Taxpayers, the environment, the politicaly weak and diffuse interests generally, tend to be institutionally underrepresented in our system. Ratepayers constitute a paradigm example of such underrepresentation. It is important that efforts to allow the organization and representation of otherwise diffuse and underrepresented groups be stimulated by public policies and that states be allowed some latitude in accomplishing that balance. Although not an envelope access case, this Honorable Court has recently reaffirmed the importance of State decisionmaking in our federal system in *Garcia v. Antonio Metropolitan Transit Authority*, 53 U.S.L.W. at 4137-38.

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the commonweal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be (at 4140).

VII.

CONCLUSION

California's system to facilitate ratepayer communication and balanced advocacy is a bit different. But differences by local preference is an American strength, not a cause for federal reprimand. We have a considered and *bona fide* attempt to balance legitimate interests by the California PUC. It is not bullying a bereft and impotent victim or taking from a helpless orphan. It is not a bullying at all. It is not a taking at all. It is a *de minimus* and somewhat creative attempt to allow enhanced communication and representation of those who are traditionally the bullied victims. Its impact on Constitutional values? Increased diversity of expression at minimal cost to any party, enhanced First Amendment voluntary association of ratepayers for their common interests, more legitimate due process in rate hearings as ratepayers achieve more balanced advocacy status.

The Center for Public Interest Law respectfully asks that this Honorable Court not reverse the original, and we believe successful, attempt by the PUC of California to improve regulatory governance, stimulate citizenship and vivify Constitutional values.

Dated: July 19, 1985

Respectfully submitted,

Center for Public Interest Law

By: _____
Robert C. Fellmeth